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ADELPHIA COMMUNICATIONS
CORPORATION, aka Century Mendocino Cable
TV dba Adelphia Cable Communications

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs.

V.

PACIFIC GAS & ELECTRIC COMPANY; et al.,

Defendants

ADELPHIA COMMUNICATIONS
CORPORATION, aka CENTURY
MENDOCINO CABLE TV dba ADELPHIA
CABLE COMMUNICATIONS.

Cross-Complainant.

v.

PAULEY CONSTRUCTION, INC., and ROES
1 to 50 INCLUSIVE

Cross-Defendants

1. INTRODUCTION

Removal of this action was appropriate and indeed mandatory because PAULEY has raised an issue over which the Bankruptcy Court of the Southern District of New York has retained exclusive
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1 jurisdiction. (Because the jurisdiction is exclusively with the Bankruptcy Court, the timing of removal
 2 is immaterial.)

3 The issue which involves the bankruptcy proceeding stems from what can at best be described
 4 as "inconsistent" positions taken by PAULEY with respect to its rights against and duties to
 5 ADELPHIA. Factually what occurred was as follows: PAULEY was serving as a general contractor
 6 to ADELPHIA. The contract required that ADELPHIA pay PAULEY and it required that PAULEY
 7 indemnify ADELPHIA should injuries occur on the job. In May of 2002 an extremely serious injury
 8 to a PAULEY subcontractor employee occurred. In June of 2002, ADELPHIA filed for bankruptcy.
 9 PAULEY submitted a claim in the bankruptcy proceeding for the approximately \$4,200,000 it was
 10 owed under its contract. PAULEY's claim denied that there were any obligations owed by PAULEY
 11 to ADELPHIA (i.e. ignored the indemnity obligation). Ultimately the claim was satisfied in full.

12 The injured employee's action against ADELPHIA and PAULEY was eventually settled for
 13 \$19,000,000, \$5,000,000 having been contributed on behalf of ADELPHIA. ADELPHIA has cross-
 14 complained against PAULEY pursuant to the contract indemnity provisions. PAULEY now asserts
 15 that the bankruptcy constituted a breach and that it therefore has no obligation to indemnify
 16 ADELPHIA. If this assertion is not denied, then there will be a double recovery, i.e. full
 17 compensation of the claim in the bankruptcy proceeding which chose to ignore a countervailing claim
 18 and an additional \$5,000,000 benefit by way of defense to ADELPHIA's cross-complaint.

19 Either of two remedies would be appropriate: One remedy would be for PAULEY (or the
 20 entities to whom it assigned its claims in the bankruptcy proceeding) to reimburse the bankrupt estate
 21 an amount equal to its indemnity obligation in recognition of the offsetting nature of the claims; the
 22 other remedy would simply be an order precluding PAULEY from asserting the bankruptcy
 23 proceeding as a defense to its obligation to indemnify.

24 This is clearly an issue that belongs before the Bankruptcy Court which has retained exclusive
 25 jurisdiction.

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1 **II. THE BANKRUPTCY COURT RETAINED EXCLUSIVE**
 2 **JURISDICTION OVER ASPECTS OF PAULEY'S CLAIMS.**

3 The United States Bankruptcy Court, Southern District of New York retained "exclusive
 4 jurisdiction" over a broad range of matters relating to the ADELPHIA bankruptcy. The exact
 5 language can be found in Article 15 of the First Modified Fifth Amended Joint Chapter 11 Plan for
 6 ADELPHIA COMMUNICATIONS CORPORATION and Certain of Its Affiliated Debtors
 7 (hereinafter the "Plan"). Case No 02-41729 REG, docket entry 12952, Southern District of New York,
 8 Bankruptcy Court. The Plan retains "exclusive jurisdiction over any matter, (a) arising under the
 9 Bankruptcy Code, (b) arising in or related to the Chapter 11 cases or the Plan, or (c) that relates to the
 10 following:

- 11 i. To hear and determine any and all motions or applications pending
 on the Confirmation Date or thereafter brought in accordance with
 Article XIV hereof for the assumption, assumption and assignment, or
 rejection of executory contracts or unexpired leases to which any Debtor
 is a party or with respect to which any of the Debtors may be liable, and
 to hear and determine any and all claims and any related disputes;
- 12 ii. To determine any and all proceedings, applications, motions, and
 contested or litigated matters that may be pending on the Effective Date
 or that, pursuant to the Plan may be instituted by the Plan Administrator,
 the Contingent Value Vehicle, the Debtors, or Person, as applicable,
 after the effective date;
- 13 iii. To hear and determine any objections to the allowance of Claims ...;
- 14 vii. To hear and determine all controversies, suits, and disputes that
 may relate to, impact upon, or arise in connection with the Plan, the Plan
 Documents, or their interpretation, implementation, enforcement, or
 consummation;
- 15 viii. To hear and determine all controversies, suits, and disputes that
 may relate to, impact upon, or arise in connection with the Confirmation
 Order . . .;
- 16 xii. To hear and determine all controversies, suits, and disputes that
 may relate to, impact upon, or arise in connection with any set off and/or
 recoupment rights of the Debtors, the Contingent Value Vehicle, or any
 Person under the Plan;
- 17 xiii. To hear and determine all controversies, suits, and disputes that
 may relate to, impact upon, or arise in connection with Causes of Action
 of the Debtors commenced by the Plan Administrator, the Contingent
 Value Vehicle, the Debtors or any third parties, as applicable, before or
 after the Effective Date;

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1 xv. To issue injunctions, enter and implement other orders or state such
 2 other actions as may be necessary or appropriate to restrain interference
 3 by any Person with consummation, implementation or enforcement of
 the Plan, the Plan Documents, or the Confirmation Order.”
 (Bankruptcy Plan Article 15)

4 PAULEY’S claim that the ADELPHIA bankruptcy essentially rescinds the PAULEY-
 5 ADELPHIA contract falls squarely within the Bankruptcy Court’s retention of jurisdiction.

6 In more detail, On May 1, 2002, Sifa Tuiaki was working on cable lines that were the subject
 7 of the ADELPHIA-PAULEY contract, and came into contact with high voltage electrical lines. *See*
 8 Exhibit E of ADELPHIA’s cross-complaint. Mr. Tuiaki subsequently filed a lawsuit against, *inter*
 9 *alia*, PAULEY and ADELPHIA. ADELPHIA filed a cross-complaint against PAULEY because the
 10 work Tuiaki was performing was part of the work performed pursuant to the contract between
 11 PAULEY and ADELPHIA. ADELPHIA’s lawsuit seeks indemnification pursuant to the
 12 ADELPHIA/PAULEY contract for amounts paid to Tuiaki in settlement.

13 On June 25, 2002, ADELPHIA and subsidiaries filed for voluntary Chapter 11 bankruptcy in
 14 the United States Bankruptcy Court, Southern District of New York. *See* ADELPHIA’s cross-
 15 complaint ¶ 9. Tuiaki obtained an order granting relief from the stay imposed.

16 PAULEY filed a proof of claim for \$4,251,595.08 for services performed pursuant to the
 17 PAULEY-ADELPHIA contract during the period in which Sifa Tuiaki’s accident took place. *See*
 18 ADELHPIA’s cross-complaint, ¶ 10 and Exhibit C. In its proof of claim PAULEY voluntarily
 19 submitted itself to the jurisdiction of the Bankruptcy Court of the Southern District of New York, and
 20 PAULEY never withdrew said claim. The Bankruptcy Court allowed PAULEY’s proof of claim for
 21 payment of the full amount claimed of \$4,251,595.08 plus interest in the amount of \$1,575,924.58, for
 22 a total amount of \$5,827,519.66. *See* ADELPHIA’s cross-complaint, ¶ 15. Confirmation of the Plan
 23 occurred on January 5, 2007, and on February 13, 2007, PAULEY’s proof of claim was satisfied by
 24 payment of cash and Time-Warner Cable common stock. *See* ADELHPIA’s cross-complaint, ¶ 16.

25 Because the Bankruptcy Court expressly retained exclusive jurisdiction, PAULEY’s motion to
 26 remand is without basis, and should be denied.

27 In *S.G. Phillips Constructors, Inc. v. City of Burlington*, the City claimed an out of district
 28 bankruptcy court had no jurisdiction over its state law contract claim. 45 F.3d 702, 703. However, the

1 Second Circuit stated that when the City filed its proof of claim relating to the underlying contract, the
 2 City submitted itself and the matter to the bankruptcy court's jurisdiction. *Id.* at 705. The Court
 3 stated

4 "[b]ecause 'nothing is more directly at the core of bankruptcy
 5 administration . . . then the qualifications of all liabilities of the debtor,'
 6 the bankruptcy court's determination whether to allow or disallow a
 7 claim is a core function."

8 *Id.*, citing to *In Re BKW Sys.*, 66 Bankr. 546, 548 (Bankr. D.N.H. 1986).

9 Although PAULEY's claim has already been paid, the Bankruptcy Court may revisit and
 10 disallow a claim previously allowed, "for cause." 11 U.S.C. section 502(j). When a party to a
 11 contract files a proof of claim, issues of enforcement of the contract are "core proceedings," and the
 12 Bankruptcy Court has exclusive jurisdiction. *See Gulf States Exploration Co. v. Manville Forest
 Products Corporation*, 896 F.2d 1384, 1389 (2nd Cir. 1990).

13 In summary, a claim of setoff clearly has value. PAULEY (through its insurers) seeks to
 14 realize a value of up to \$5,000,000 by asserting that ADELPHIA's bankruptcy relieves PAULEY of
 15 PAULEY's obligation to indemnify ADELPHIA. But PAULEY itself, in its claim in the bankruptcy
 16 proceeding chose not to set off its obligation to indemnify ADELPHIA, an obligation which would
 17 have reduced or even eliminated the amount of PAULEY's claim in the bankruptcy proceeding. This
 18 inconsistency of position is particularly egregious given that PAULEY's claim was subsequently
 19 allowed and compensated in full. The result is clearly a double recovery. The Bankruptcy Court has
 20 retained exclusive jurisdiction with respect to a number of issues including: "to hear and determine all
 21 controversies, suits, and disputes that may relate to, impact upon, or arise in connection with any
 22 setoff and/or recoupment rights of the Debtors . . . or any Person under the Plan."

23 The issue which PAULEY has raised by asserting the bankruptcy as a defense in the indemnity
 24 action is clearly one over which the Bankruptcy Court has retained exclusive jurisdiction and the
 25 matter was appropriately removed and should be transferred to the Bankruptcy Court. Removal
 26 pursuant to 28 U.S.C. section 1478 requires a party to first remove the action to the district court
 27 where the civil action is proceeding and then have it transferred to the bankruptcy court conducting the
 28 main proceedings. See *National Developers, Inc. v. Ciba-Geigy Corp.*, 803 F.2d. 616 (11th Cir.,

1 1986). The Motion to Transfer should be considered first. If transfer is appropriate, the motion to
 2 remand and to dismiss should be taken up by the Bankruptcy Court. One court held:

3 "While the threshold question in most removed civil actions is whether
 4 removal is proper, that issue is preempted here by motions to transfer
 5 and the issue of whether this court may decide the matters pending
 before it or whether those matters should be transferred to the
 bankruptcy court of the Northern District of Illinois."

6 *Twyman v. Wedlo, Inc.*, 204 B.R. 1006, 1011 (N.D. Ala. 1998). As such, this Court should transfer
 7 this case, and this motion to the Bankruptcy Court, who has retained jurisdiction of this dispute.

8 **III. ADELPHIA TIMELY REMOVED THIS MATTER PURSUANT TO 28 U.S.C. § 1446**

9 Even if the Bankruptcy Court's retention of jurisdiction is not in and of itself enough to
 10 remove this matter, ADELPHIA complied with 28 U.S.C. section 1446(b), and removed the matter
 11 within thirty days of the first pleading upon which ADELPHIA could "ascertain" the matter belonged
 12 in the Bankruptcy Court.

13 **A. All Reference to the Mediation or the Mediation Brief Must be
 14 Stricken.**

15 PAULEY argues that it informed ADELPHIA of bankruptcy issues in a mediation brief. Yet,
 16 PAULEY's references to the mediation brief and conference held on January 11, 2007, are
 17 inadmissible pursuant to California Evidence Code section 1119.

18 "All communications, negotiations, or settlement discussions by and between participants in
 19 the course of a mediation or a mediation consultation shall remain confidential." Cal. Evid. Code §
 20 1119(c). California Evidence Code section 1128 discusses the effect of a reference to any mediation
 21 communications, and states that such reference:

22 "is grounds for vacating or modifying the decision in that proceeding, in
 23 whole or in part, and granting a new or further hearing on all or part of
 24 the issues, if the reference materially affected the substantive rights of
 the party requesting relief."

25 PAULEY violated the mediation privilege, and ADELPHIA requests this court strike any and
 26 all reference and argument relating to communications that allegedly occurred in the mediation itself
 27 and the alleged mediation brief.

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1 Moreover, PAULEY attempts to introduce evidence from a mediation brief to establish that
 2 ADELPHIA had notice prior to March 26, 2007 that PAULEY would assert matters arising under the
 3 Bankruptcy Code. Yet, the so-called “evidence” PAULEY cites to is nothing more than
 4 unauthenticated hearsay statements allegedly quoting its mediation brief. PAULEY failed to submit
 5 the actual brief. As such, this portion of PAULEY’s motion can not be considered by the court
 6 because it is inadmissible hearsay.

7 There is no evidence whatsoever that this mediation brief was ever served on ADELPHIA. No
 8 proof of service or other admissible evidence is presented by PAULEY in support. Therefore,
 9 whatever the contents of the mediation brief, it is moot because ADELPHIA did not have notice. It is
 10 not clear why PAULEY did not attempt to attach the entire mediation brief, but one can only assume
 11 that it was because PAULEY wanted the remainder of the mediation brief to remain confidential.
 12 Next, PAULEY makes an unsupported assertion that there were discussions in great detail at the
 13 January 11, 2007 mediation session. Again, none of this is admissible evidence either under Evidence
 14 Code section 1119 or the hearsay rule.

15 **B. ADELPHIA Could Not Ascertain This Matter Necessitated
 16 Removal Based on a One Sentence Off-Hand Reference to the
 17 Bankruptcy Proceeding.**

18 PAULEY claims that one sentence in its January 8, 2007 Motion for Judgment on the
 19 Pleadings was enough for ADELPHIA to “ascertain” that this action should have been removed,
 20 namely: “In fact, ADELPHIA’S ability to perform its obligations under the contract was extinguished
 21 on June 25, 2002, when it filed bankruptcy.” PAULEY’S Motion for Judgment on the Pleadings, p.3.

22 Contrast that to PAULEY’s arguments made in its Demurrer of March 26, 2007 which states:

23 “Adelphia’s assertion that it has substantially performed is negated by
 24 paragraph 9 lines 26-28; 1-2 pages 2 through 3, whereby a claim clearly
 25 admits that it owes Pauley over \$4.2 million for work that Pauley
 26 performed under the contract between November 15, 2001 and July 16,
 27 2002. To date this amount has never been paid. The material breach of
 28 the contract by Adelphia, i.e., by failing to pay Pauley over \$4.2 million
 in progress payments under the executory construction contract,
 precludes Adelphia from seeking to enforce the terms of the contract
 against Pauley.

Significantly, Adelphia rejected the July 7, 2000 executory contractor it had Pauley, thus the bankruptcy estate lost any benefits it had under the contract and is liable for all damages caused by the rejection, which is considered a material breach of contract. Rejection is the functional

1 equivalent of abandonment of the right to compel the contracting party's
 2 performance for want of benefit to the estate. (*In Re Miller*, 103 B.R.
 3 353, 354 (Bankr. D.D.C. 1989).)

3 Rejection does not cause the contract to "disappear" for the contracting
 4 party (PAULEY), will have a claim against the estate, subject to certain
 5 restrictions, for the value of the debtors performance under the now-
 6 breached contract. Under rejection, both the trustee (or debtor in
 7 possession) and the contracting party are excused from further
 8 performance under the contract. (11 U.S.C. §§ 365(g), 502(g).)
 9 Rejection is intended to (1) guard the estate against elevating contract
 10 obligations; and (2) treat the claim arising from the Rejection as a pre-
 11 petition, unsecured claim. Rejection of a contract is deemed a breach by
 12 the debtor immediately before the commencement of the case, which
 13 gives rise to a pre-petition claim for the debtors' failure to perform
 14 under the contract. (11 U.S.C. §§ 365(g), 502(g).) The remedies
 15 available to the contracting party upon a breach are those available
 16 under applicable state law."

1 PAULEY'S January 8, 2007 motion does not mention PAULEY'S theory that the Bankruptcy Court
 2 rejected the PAULEY-ADELPHIA contract, and is too general a statement for ADELPHIA to have
 3 ascertained the action required removal and transfer. (PAULEY's Memorandum of Points and
 4 Authorities of Cross-Defendant PAULEY CONSTRUCTION, INC. in Support of Demurrer to Cross-
 5 Complainant ADELPHIA COMMUNICATIONS CORPORATION's amended cross-complaint, pp.
 6 8-9, attached as Exhibit B to ADELPHIA's Notice of Removal.)

7 It is important to point out that January 5, 2007, was the date the judge in the Southern District
 8 of the New York Bankruptcy Court confirmed ADELPHIA's Bankruptcy Plan. Coincidentally, on
 9 January 9, 2007, PAULEY filed a motion for judgment on the pleadings of the cross-complaint filed
 10 by ADELPHIA stating that ADELPHIA's cross-complaint failed because it did not state that
 11 ADELPHIA fully performed. PAULEY sought judicial notice of the January 9, 2007 motion for
 12 judgment on the pleadings, and claims that this document should have put ADELPHIA on notice of
 13 issues arising under the Bankruptcy Code and triggered the thirty day time limit of section 1446(b).
 14 On review of PAULEY's motion, it only cites to California case law and statutes, and exclusively
 15 argues that ADELPHIA's cross-complaint failed to state a contract cause of action under California
 16 State Law.

17 PAULEY claims that one sentence which was neither supported by any statutory or case law
 18 nor any factual substance should have put ADELPHIA on notice of PAULEY's attempt to use the

1 bankruptcy matter as a defense for a contract under which it has already been paid within the auspices
 2 of the Bankruptcy Court. PAULEY's attorneys are arguing that PAULEY was never paid under the
 3 contract, yet it knew that the contract had been fully satisfied due to the allegations of ADELPHIA's
 4 second amended cross-complaint.

5 Section 1446(b) outlines two separate thirty-day time limits, and each time limit is triggered by
 6 different standards. *Bosky v. Kroger Limited Partnership I*, 288 F.3d 208, 210-211 (5th Cir. 2002).
 7 The first thirty day time limit deals with instances where the "the initial pleading setting forth the
 8 claim for relief" is removable. 28 U.S.C. § 1416(b). This is not applicable. The second thirty day
 9 time frame applies to instances where "a copy of an amended pleading, motion, order, or other paper is
 10 served from which it may first be ascertained that the case is one which is or has become removable . . ."
 11 ... 28 U.S.C. § 1446(b). The second thirty day time limit begins to run only when it may be
 12 "ascertained" that the case is removable. *Id.* The term "ascertain" "require[s] a greater level of
 13 certainty or that the facts supporting removability be stated unequivocally." *Bosky, supra*, at 211.

14 In *Ortiz v. Brownsville Independent School District*, the court held that an amended pleading
 15 referencing "violations of the laws and constitution [] of the United States" was not enough for the
 16 removing party to ascertain that the action was removable. 257 F.2d. 885, 888 (S.D. Tex. 2003).
 17 Likewise, PAULEY's statement in its motion for judgment on the pleadings and its reply brief, were
 18 not enough for ADELPHIA to "ascertain" that PAULEY was attempting to shield itself by
 19 manipulating the bankruptcy proceedings and rulings. The one sentence statement by no means rises
 20 to the level of unequivocally laying out facts supporting removability as required by *Bosky*. Therefore,
 21 the appropriate trigger for section 1446(b), the second paragraph, is the March 26, 2007, demurrer by
 22 PAULEY to ADELPHIA's first amended cross-complaint.

23 PAULEY makes some vague reference to the real parties in interest, but does not present this
 24 court with any admissible evidence relating to its claims. The litigants speak for themselves.
 25 ADELPHIA was sued in its own capacity by plaintiff Tuiaki as was PAULEY. They are the parties to
 26 the underlying contract and they are the real parties in interest. Absent any admissible information,
 27 the case caption and the appearance of the attorneys for the respective parties speak for themselves.

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IV. CONCLUSION

ADELPHIA removed this action, and seeks a transfer to the Southern District of New York Bankruptcy Court because PAULEY is using the Bankruptcy Court's rulings to profit under a contract, and turn around to the San Francisco Superior Court and disclaim the very contract it saw paid in full. The Bankruptcy Court retained exclusive jurisdiction over matters like these to prevent just this sort of injustice. ADELPHIA requests this Court deny PAULEY's motion to remand and grant ADELPHIA's motion to transfer.

Date: June 7, 2007

RYAN & LIFTER
A Professional Corporation

By /s/ Michael J. Daley
MICHAEL J. DALEY

Attorney for Defendant/Cross-Complainant
ADELPHIA COMMUNICATIONS
CORPORATION, aka Century Mendocino Cable
TV dba Adelphia Cable Communications

PROOF OF SERVICE

I, ANNETTE DI GIOVANNI, declare that I am over the age of 18 years and not a party to the within action; that my business address is 2010 Crow Canyon Place, Suite 330, San Ramon, California 94583-1344; and that on this date I served a true copy of the foregoing document(s) entitled: **CROSS-COMPLAINT'S OPPOSITION TO PAULEY CONSTRUCTION, INC.'S MOTION TO REMAND TO STATE COURT [28 U.S.C. § 1447(c)]** on the parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

- (By Overnight Courier) I caused each envelope, with postage fully prepaid, to be sent by Federal Express.

(By Mail) I caused each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Ryan & Lifter.

(By Hand) I caused each envelope to be delivered by hand to the offices listed above.

(By Telecopy) I caused each document to be sent by Automatic Telecopier to the number as indicated above.

(By Electronic Transfer) I caused the above document to be served through CM/ECF addressed to all parties appearing on the electronic service list on the date executed below. The file transmission was reported as complete and a copy of the "file & serve filing receipt" page will be maintained with the original document(s) in our office.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 2007, at San Ramon, California.

Annette Di Giovanni
ANNETTE DI GIOVANNI

